



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

ANDY BESHEAR
ATTORNEY GENERAL

OAG 17-026

CAPITOL BUILDING, SUITE 118
700 CAPITOL AVENUE
FRANKFORT, KENTUCKY 40601
(502) 696-5300
FAX: (502) 564-2894

November 9, 2017

Subject: Whether the offices of Augusta City Council and Bracken County Planning Commission are incompatible if Bracken County does not have zoning ordinances.

Requested by: Cynthia Thompson, City Attorney to the City of Augusta, and Timothy Theissen, Attorney for the Bracken County Planning Commission

Written by: Taylor Payne, Assistant Attorney General

Syllabus: The offices of the Augusta City Council and the Bracken County Planning Commission may be incompatible at common law because the occupancy of the two offices may be against public policy. This issue is, however, ultimately a question for the courts to decide.

Statutes construed: KRS 100.133; KRS 100.111; KRS 61.080; KRS 100.121

OAGs cited: OAG 66-586; OAG 71-204; OAG 97-21; OAG 80-199

Opinion of the Attorney General

Cynthia Thompson, City Attorney to the City of Augusta, and Timothy Theissen, Attorney for the Bracken County Planning Commission, have requested an opinion from this office to address whether a City of Augusta council member may also sit on the Bracken County Planning Commission if Bracken County does not have zoning ordinances. We advise that the offices of the Augusta City Council and the Bracken County Planning Commission may be incompatible at common law because the occupancy of the two offices may be

against public policy. The issue of common law incompatibilities, however, is ultimately a question for the courts to decide.

KRS Chapter 100 authorizes the appointment of public officials to a planning commission. See OAG 66-586, OAG 71-204.¹ Nonetheless, while public officials may serve on a planning commission, a public official may not fill two incompatible offices at the same time. See *LaGrange City Council v. Hall Bros. Co. of Oldham County, Inc.*, 3 S.W.3d 765, 769 (Ky. 1999) (citing *Rash v. Louisville & Jefferson County Metro. Sewer Dist.*, 217 S.W.2d 232, 236 (Ky. 1949)).

Kentucky courts recognize two kinds of incompatibility between public offices. The first is "a constitutional or statutory incompatibility, which is so declared by the Constitution or legislative enactment. *Id.* (citing *Knuckles v. Bd. of Educ. of Bell County*, 114 S.W.2d 511 (Ky. 1938)). For example, Section 165 of the Kentucky Constitution prohibits a person from filling two municipal offices at the same time, except as otherwise provided in the Constitution. Similarly, KRS 61.080(3) prohibits a person from filling a county office and a municipal office at the same time. The second type of incompatibility is "a common-law or functional incompatibility, which is declared by courts . . . when the two offices are inherently inconsistent or repugnant, or when the occupancy of the two offices is detrimental to the public interest." *Id.* (citing *Polley v. Fortenberry*, 105 S.W.2d 143, 144-45 (Ky. 1937) and *Barkley v. Stockdell*, 66 S.W.2d 43, 44 (Ky. 1933)).

With respect to any constitutional or statutory incompatibility between the offices, according to the requesters, the Bracken County Planning Commission is a joint planning unit created pursuant to KRS 100.121 that carries out a joint city-county planning program. A joint planning unit "is not a state, county, or city agency but a hybrid entity not contemplated by the state constitution nor . . . KRS 61.080." OAG 97-21 (citing OAG 80-219, OAG 66-777). Members of a hybrid entity hold a hybrid office, rather than a municipal or county office. See OAG 80-199 (describing members of a hybrid park board as holding a hybrid office). Accordingly, neither the Constitution nor KRS 61.080 prevent a person from holding a hybrid office and a city office. As a result, there is no constitu-

¹KRS 100.143 states that "the term of office of all elected public officials appointed to a planning commission shall be the same as their official tenure in office." Furthermore, KRS 100.133(2) requires that at least two-thirds of the members serving on a planning commission be "citizen members," which is defined by KRS 100.111(4) as a member "who is not an elected or appointed official or employee of the city, council, or consolidated government[.]"

tional or statutory incompatibility between offices of the Bracken County Planning Commission and the Augusta City Council.

With respect to the issue of common law incompatibility, whether such an incompatibility exists is "ultimately, a question for the courts to decide." OAG 77-712. Having said that, we understand the requesters of this opinion specifically to seek this office's opinion on the applicability of common law incompatibility to the situation at hand. The requestors direct our attention to *LaGrange City Council*, wherein, the Kentucky Court of Appeals held that concurrent occupancy of the offices of city council and a county planning commission are functionally incompatible under the common law. *Id.* at 768. The Court's holding rested on each offices' roles "with respect to zoning matters." *Id.* at 770. In particular, the Court referenced KRS 100.211(1), which requires the planning commission to hold a public hearing on applications for proposed zoning map amendments, and to make findings of fact and a recommendation whether to approve the proposed map amendment. *Id.* However, the "local legislative body . . . possesses the ultimate authority to approve or deny the map amendment." *Id.* (footnote omitted). The Court determined that a local legislative body's "authority to review recommendations made by the Planning Commission is directly related to the functioning of the Planning Commission." Additionally, the Court reasoned that because "in rezoning cases, both the Planning Commission and the City Council function in an adjudicatory role . . . both due process and public policy prohibit" a city council member from also serving on a planning commission. *Id.* at 771.

The requesters suggest that *LaGrange City Council* does not control the situation here because Bracken County has no zoning ordinances. The requesters inform this office that instead the Bracken County Planning Commission adopts a comprehensive plan, as set forth by KRS 100.183, adopts subdivision regulations, as set forth by KRS 100.273, and adopts cellular tower regulations, as set forth by KRS 100.986, none of which are directly reviewable by the City Council. However, under KRS 100.193(1), the Planning Commission must also "prepare and adopt the statement of goals and objectives to act as a guide for the preparation of the remaining elements and the aids to implementing the [comprehensive] plans." The City Council then has the authority to consider, amend and adopt the statement. *Id.* Additionally, the City Council has authority to appropriate money from the general revenue for expenses and accommodation necessary

for the Planning Commission and may assign the Planning Commission other agency functions related to urban renewal, public housing and community development. KRS 100.177, KRS 100.181.

Even without zoning ordinances, the City Council's authority to appropriate money to the Planning Commission and to approve the goals and objectives to guide the comprehensive plan is "directly related to the functioning of the Planning Commission." Therefore, the analysis of *LaGrange City Council* is applicable to the situation at hand. Furthermore, Section 165 of the Kentucky Constitution would preclude occupancy of these offices if the Planning Commission were a city commission, and KRS 61.080 would preclude occupancy of these offices if the Planning Commission was a county commission. Yet, the office of the Planning Commission evades constitutional or statutory review for incompatibilities with other offices as a result of being an office of a hybrid commission. However, being a hybrid commission does not necessarily assuage any of the public policy concerns behind those laws. Considering these public policy concerns and the analysis applied in *LaGrange City Council*, we advise that the offices of the Augusta City Council and the Bracken County Planning Commission may be incompatible at common law because the occupancy of the two offices would permit the same person to take part in activities of the Planning Commission and also review, approve and amend some of those activities, as well as appropriate the money to carry out those activities. However, the issue is, ultimately, only one in which the courts of this state can decide.

ANDY BESHEAR
ATTORNEY GENERAL



Taylor Payne
Assistant Attorney General